Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 88-893

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

IN THE MATTER OF THE ESTATE OF
FLORENCE E. WALKER

BENFORD WALKER and GLEN WALKER,

Appellants,

vs.

REXFORD A. WALKER, CHARLOTTE SMITH, CHARLES J. WALKER, MILO D. DAILEY IV, MARGARET REBECCA THURSTON and MICHAEL DAILEY and VALLEY NATIONAL BANK OF DES MOINES, IOWA, ADMINISTRATORS OF THE FLORENCE WALKER ESTATE,

Appellees.

ON APPEAL FROM THE
IOWA COURT OF APPEALS

APPELLEES' MOTION TO DISMISS AND ALTERNATIVE MOTION TO AFFIRM

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28 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.	ii-iii
MOTION TO DISMISS	1-4
ALTERNATIVE MOTION TO AFFIRM .	5-6
ARGUMENT.	7
BRIEF POINT I	7-11
BRIEF POINT II	12-15
CONCLUSION.	15-17
APPENDIX A.	18-19

TABLE OF AUTHORITIES

Page

I. JUDICIAL DECISIONS

Caldwell v. Texas,
137 U.S. 692, 34 L.Ed. 816,
11 S.Ct. 224 (1891). . . . 10

Delmar Jockey Club v.
Missouri,
210 U.S. 324, 52 L.Ed. 1080,
28 S.Ct. 732 (1908). . . . 10

Equitable Life Assurance
Society v. Brown,
187 U.S. 308, 47 L.Ed. 190,
23 S.Ct. 123 (1902). . . . 10

Parker v. McLain,
237 U.S. 469, 59 L.Ed. 1051,
35 S.Ct. 632 (1914). . . . 11

Wabash R. Co. v. Flannigan,
192 U.S. 29, 48 L.Ed. 328,
24 S.Ct. 224 (1904). . . . 10

Zucht v. King,
260 U.S. 174, 67 L.Ed. 194,
43 S.Ct. 24 (1922) 15

II. AUTHORITIES

21st Amendment to the Iowa
Constitution. 2,7

14th Amendment to the United States Constitution 7,10

28 U.S.C.S. §1257 9

28 U.S.C.S. §1257(2). 1, 2, 7, 9, 16

Rule 16(a), United States Supreme Court 4, 16

Rule 16(c), United States Supreme Court 6, 15

MOTION TO DISMISS

COME NOW the Appellees, Rexford A. Walker, Charlotte Smith, Charles J. Walker, Milo D. Dailey IV, Margaret Rebecca Thurston and Michael Dailey, and pursuant to Rule 16(a) of the Rules of the Supreme Court of the United States move the Court for an Order dismissing the above-captioned appeal. In support of said Motion, the Appellees state as follows:

1. Appellants' Statement of Jurisdiction and Notice of Appeal take the position that this case may be entertained by the United States Supreme Court pursuant to 28 U.S.C.S. §1257(2) apparently taking the position that the case is reviewable as a matter of appeal from the Iowa Court of Appeals due to the finding of constitutionality with respect to

certain challenged provisions of the Iowa Constitution.

The only issue raised by the Appellants in the appeal to the Iowa Court of Appeals which might arguably be construed to have "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States . . ." as required for jurisdiction under 28 U.S.C.S. §1257(2) was the Appellants' challenge to the judicial selection method in Iowa and their argument that the 21st Amendment to the Iowa Constitution (providing for judicial selection) was repugnant to the United States Constitution.

In fact, the issue which is now argued by Appellants to be jurisdictional was not addressed by the Iowa Court of Appeals on the merits due to the fact that

the issue had already been determined against the Appellants in federal decisions which constituted res adjudicata to the appeal then under consideration. See Appendix A to the Jurisdictional Statement, pp. 4-5.

In fact, the Appellants' challenge of the Iowa judicial selection process was the subject matter of an action commenced by the Appellants in the United States District Court for the Southern District of Iowa, Civil No. 84-650-B filed September 6, 1984. That Complaint was dismissed by the District Court with a finding that the Complaint was without merit.

The Appellants appealed the decision of the District Court to the United States Court of Appeals for the Eighth Circuit (Appeal No. 85-1833 -- See Appendix A to this Motion). That appeal

was dismissed on January 7, 1986, again with the finding that the appeal was frivolous and without merit. Appellants sought a writ of certiorari to the United States Supreme Court, Appeal No. 85-1849, which writ was denied by the United States Supreme Court by Order of October 6, 1986.

Consequently, Appellants constitutional contentions have already been determined by the federal judiciary to be frivolous and not real. Such fictitious federal questions do not form a basis for jurisdiction for an appeal to the Supreme Court of the United States.

The instant appeal is frivolous and without merit and should be dismissed pursuant to Rule 16(a) of the Rules of the Supreme Court of the United States.

ALTERNATIVE MOTION TO AFFIRM

COME NOW the Appellees, Rexford A. Walker, Charlotte Smith, Charles J. Walker, Milo D. Dailey IV, Margaret Rebecca Thurston and Michael Dailey, and pursuant to Rule 16(c) of the Rules of the Supreme Court of the United States move the Court for an Order affirming the decision of the Iowa Court of Appeals in Appeal No. 87-223 filed June 29, 1988. In support of said Motion, Appellees state as follows:

1. The instant appeal is but the latest round of frivolous and insubstantial legal maneuvers employed by the Appellants to delay the closing of the Estate of Florence Walker and to harass the Appellees.

2. All of the issues raised by the Appellants in this appeal have been raised repeatedly by the Appellants in

various legal proceedings (including five direct appeals to the Iowa Court of Appeals or the Iowa Supreme Court related specifically to the probate proceedings in this matter). The only issues raised in Appeal No. 87-223 which had not been examined in previous appeals were the Appellants generalized objections to the closing of the estate, the payment of attorney's fees and the Iowa District Court's refusal to order the production of a transcript without the Appellants paying for the same.

The "new" issues raised in Appeal No. 87-223 were, in fact, unsubstantial and so frivolous as to not need further argument or consideration.

Accordingly, the Appellants' instant appeal to the Supreme Court of the United States should be dismissed under Rule 16(c).

ARGUMENT

BRIEF POINT I.

THIS APPEAL SHOULD BE DISMISSED AS NOT WITHIN THE COURT'S JURISDICTION UNDER 28 U.S.C.S. §1257(2).

The Appellants' claimed basis of jurisdiction is 28 U.S.C.S. §1257(2) which deals with cases where there is "drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity." Appellants' constitutional challenge deals with their contention that the 21st Amendment to the Iowa Constitution violates the 14th Amendment to the United States Constitution. As pointed out in the Appellees' Motion to Dismiss, that issue has been conclusively determined against the Appellants by a

prior federal decision. The Appellants presented the same constitutional challenge in a separate lawsuit in the United States District Court for the Southern District of Iowa entitled Glen Walker, et al v. State of Iowa, et al and identified as No. 84-650-B. That Complaint, which was filed on September 6, 1984, sought to set aside all of the previous proceedings conducted by the Iowa Probate Court in the matter of the Estate of Florence Walker. The Complaint was dismissed by the District Court with the finding that the Complaint was without merit. The Appellants appealed that decision to the United States Court of Appeals for the Eighth Circuit (Appeal No. 85-1833). That appeal was likewise dismissed on January 7, 1986, again with the finding that the appeal was frivolous and without merit (See Appendix A attached hereto). Ap-

pellants sought a writ of certiorari to the United States Supreme Court (Appeal No. 85-1849) which writ was denied by the United States Supreme Court by Order of October 6, 1986.

28 U.S.C.S. §1257(2), the claimed jurisdictional basis of this appeal is, of course, drafted with the assumption that parties and practitioners before the Court will be presenting legitimate and not frivolous or fictitious constitutional challenges. As may be seen from the foregoing history, even if the Appellants' claims were not entirely frivolous, they have already been conclusively determined against the Appellants. It is also axiomatic, however, that in order to have a jurisdictional basis for such challenge under 28 U.S.C.S. §1257, the federal question presented has to be real and not fictitious in order to allow a ba-

sis of review of state court judgments. Caldwell v. Texas, 137 U.S. 692, 34 L.Ed. 816, 11 S.Ct. 224 (1891); Equitable Life Assurance Society v. Brown, 187 U.S. 308, 47 L.Ed. 190, 23 S.Ct. 123 (1902). It has, in fact, been recognized that the United States Supreme Court is totally lacking in jurisdiction of a writ of error to a state court where there is no substance or color of merit to the federal question presented as a jurisdictional basis. Wabash R. Co. v. Flannigan, 192 U.S. 29, 48 L.Ed. 328, 24 S.Ct. 224 (1904). The mere contention that immunities secured by the 14th Amendment to the United States Constitution are violated by state court decisions have frequently been observed to be too frivolous to serve as a jurisdictional basis for appeals from state court decisions. See, e.g., Delmar

Jockey Club v. Missouri, 210 U.S. 324, 52 L.Ed. 1080, 28 S.Ct. 732 (1908). So-called "federal questions" which are merely manufactured and which rest upon obviously false assumptions have been construed to be so plainly devoid of merit as to afford no jurisdictional basis for appeals from state court decisions. See, e.g., Parker v. McLain, 237 U.S. 469, 59 L.Ed. 1051, 35 S.Ct. 632.

The completely frivolous nature of the Appellants' claim has already been repeatedly determined by judicial process including a complete exhaustion of the right of appeal by way of previously refused writ of certiorari, as noted above. Consequently, there can be no legitimate constitutional issue presented in this case and the appeal should be dismissed.

BRIEF POINT II.

THE DECISION OF THE IOWA COURT OF APPEALS IN APPEAL NO. 87-223 RENDERED JUNE 29, 1988 SHOULD BE AFFIRMED BECAUSE IT IS MANIFEST THAT THE QUESTIONS PRESENTED BY THE APPELLANTS ARE SO UNSUBSTANTIAL AS TO NEED NO FURTHER ARGUMENT.

As is pointed out in Brief Point I. of this Argument, the Iowa Court of Appeals decision from which this appeal derives was the fifth appeal to the Iowa Supreme Court or the Iowa Court of Appeals based upon the probate proceedings in the Estate of Florence E. Walker. The Appellants succeeded in delaying the closing of the estate for a period of ten (10) years by duplicitous, repetitive and frivolous appeals and collateral challenges. The decision of the Iowa Supreme Court on June 29, 1988 (Appendix A to the Jurisdictional Statement) gives a short summary

of the previous meritless appeals of the Appellants. As was pointed out in Brief Point I. of this Argument, the only new issues presented in Appeal No. 87-223 were the Appellants generalized objections to the closing of the estate and the payment of attendant legal fees for the attorney for the estate and the Appellants contention that the District Court should have ordered the production of transcripts of various District Court proceedings without the necessity of the Appellants paying for the same. As was pointed out at Pages 5 through 7 of the Appendix to the Jurisdictional Statement (in the Iowa Court of Appeals decision), the Appellants were not even serious enough about the contentions raised to order transcripts of the proceedings about which they were complaining. Consequently, the appeal presented to the Iowa

Court of Appeals had to be reviewed solely based upon the pleadings of the parties and the orders entered by the Referee in Probate and the District Court Judge. The Appellants had been warned by previous orders of the District Court and even by an advisory order of the Iowa Supreme Court that it was the Appellants duty to furnish the transcript of such proceedings if they wished to have the matter reviewed on appeal. They declined to do so. Consequently, there really were no substantive matters which could be reviewed by the Iowa Court of Appeals, nor could any such meaningful review be made by this Court due to the Appellants refusal to produce a transcript. The Appellants' contention that the Court should finance the preparation of the transcript is ludicrous and without any legal authority. The Supreme Court of the United

States has consistently declined jurisdiction where the constitutionality of state law is challenged, but where it appears that the constitutional question presented is not substantially in character. See, e.g., Zucht v. King, 260 U.S. 174, 67 L.Ed. 194, 43 S.Ct. 24 (1922).

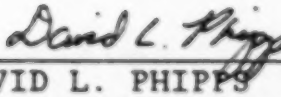
Accordingly, the decision of the Iowa Court of Appeals on June 29, 1988 should be affirmed pursuant to Rule 16(c).

CONCLUSION

The instant appeal is simply a dilatory tactic in a long series of ill-founded legal ploys. The Estate of Florence Walker has finally been closed after ten (10) years of litigation and after repeated thorough examination of all of the Appellants' contentions. No legitimate basis for jurisdiction in this Court exists

under 28 U.S.C.S. §1257(2) or any other statute. Consequently, this case should be dismissed under Rule 16(a) of the Rules of the Supreme Court of the United States. In the alternative, the Court may simply wish to affirm the judgment of the Iowa Court of Appeals of June 29, 1988 in Appeal No. 87-223 which is set forth as Appendix A in the Jurisdictional Statement. In whichever fashion seems most appropriate, this litigation should be concluded.

Respectfully submitted,



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SMITH, CHARLES J. WALKER, MILO
D. DAILEY, IV, MARGARET REBECCA
THURSTON and MICHAEL DAILEY

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1833

Glen Walker and Benford Walker,
Next Friend of Florence Walker, deceased
and Estate of Florence Walker,

Appellants,

v.

State of Iowa, Judicial Department of
State of Iowa, including Supreme Court,
Court of Appeals and Polk County District
Court; W. W. Reynoldson, Chief Justice;
Thomas J. Miller, Attorney General; Valley
National Bank and Trust Co., Administrator
of the Estate of Florence Walker and its
attorney, Bernard O'Malley,

Appellees.

Appeal from the United States
District Court for the
Southern District of Iowa.

Submitted: November 4, 1985

Filed: January 7, 1986

Before HEANEY, BOWMAN, and
WOLLMAN, Circuit Judges.

PER CURIAM.

Glen and Benford Walker appeal pro se from the district court's dismissal of their civil rights suit for failure to state a claim. They allege that they and their deceased mother, Florence Walker, were deprived of due process of law in state court proceedings concerning the conservatorship of Florence Walker and probate of her will. They also contend that the twenty-first amendment to the Iowa Constitution violates the Federal Constitution because it denies them the right to vote for state judges.

We have carefully reviewed that record and we find appellant's (sic) arguments frivolous and without merit. Accordingly, the appeal is dismissed. See 8th Cir. R. 12(a).

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

CERTIFICATE OF SERVICE

COMES NOW the undersigned and pursuant to Rule 28(b) hereby certifies that this Motion to Dismiss and Alternative Motion to Affirm has been served upon the Appellants, Benford Walker and Glen Walker, pursuant to Rule 28.3 by mailing to each Appellant, as set forth below, three (3) copies of the Motion and by depositing said copies in the United States postal mailbox, with first- class postage prepaid, addressed to the Appellants as set forth below:

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201 N.W. College
Ankeny, Iowa 50021

Glen Walker
201 N.W. College
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By: David L. Phipps
DAVID L. PHIPPS

ATTORNEYS FOR APPELLEES, REXFORD A. WALKER, CHARLOTTE SMITH, CHARLES J. WALKER, MILO D. DAILEY, IV, MARGARET REBECCA THURSTON and MICHAEL DAILEY

STATEMENT OF FILING

STATE OF IOWA :
: ss.
COUNTY OF POLK :

COMES NOW the undersigned attorney for the Appellees and hereby states that the foregoing Motion to Dismiss and Alternative Motion to Affirm were timely filed with the Clerk of the United States Supreme Court by depositing said Motion in a United States postal mailbox, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court on the 29 day of December, 1988. The undersigned further states that said mailing, to his knowledge, took place on the 29 day of December, 1988, which was within the permitted time for the filing of said Motion.

David L. Phipps

DAVID L. PHIPPS
Attorney at Law

Subscribed and sworn to before me by the said David L. Phipps this 27th day of December, 1988.

Kathleen M. Conley

Notary Public in and for the
State of Iowa